No. 33438-4-III
Consolidated with
No. 35223-4-III

COURT OF APPEALS, DIVISION III
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

JOSEPH P. SULLIVAN, APPELLANT

APPEAL FROM THE SUPERIOR COURT OF GRANT COUNTY
Cause No. 14-1-00364-4

BRIEF OF RESPONDENT

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II. STATEMENT OF THE CASE[1]

Sullivan was charged, CP 94–95, tried, and convicted, CP 430, of third degree assault on a law enforcement officer, RCW 9A.36.031(1)(g) and resisting arrest, RCW 9A.76.040. The facts concerning events leading up to Sullivan's arrest follow. Other facts relevant to individual issues are set forth only in the sections addressing those issues.

United States Department of Interior employee Cullen Roland was a security response force officer at Grand Coulee Dam (the dam). RP 192. His job is "basically to protect the dam," including excluding people who

[1] The State cites collectively to the 5 volume, sequentially paginated Verbatim Report of Proceedings (VRP) from trial, April 15 through April 21, 2015, and from the June 8, 2015 hearing, as RP __. VRP from the pretrial hearings are referred to as follows: the February 11, 2015 CrR 3.5 hearing is 2RP __; the March 31, 2015 readiness hearing is 3RP __; the April 6, 2015 readiness hearing is 4RP __.

do not have a right of access to the structures or surrounding property. RP 192–93. Responding to a reported trespasser, Roland saw Sullivan fishing on the shoreline below the dam. *Id.* Sullivan was in a restricted area beyond posted no-trespassing signs. RP 219. Grand Coulee Police Department Officer Joe Higgs encountered Sullivan after receiving a trespassing-in-progress call from plant protection at the dam. RP 247–48. Higgs did not initially intend to arrest Sullivan for trespassing, only to notify him he was in a restricted area. RP 257. When he first made contact with Sullivan, Higgs told Sullivan the area was off-limits and that signs were posted. *Id.* He explained an email Sullivan showed him did not give complete information about the restricted area. *Id.* Higgs pointed to the general area of the signs, some distance from where they were then standing. *Id.* Sullivan asserted he had a right to be where he was. *Id.*

Sullivan refused to leave the restricted area. RP 257. Higgs decided to issue a "trespass" notice, formally notifying him he could not be in the restricted area. *Id.* Higgs needed to see Sullivan's identification. *Id.* Sullivan refused and demanded a federal marshal. *Id.* Higgs explained he had contractual authority to trespass Sullivan, that Sullivan was already trespassing and that refusing to produce identification would constitute obstruction. RP 257–58. Sullivan refused. RP 258. Higgs then attempted

to arrest Sullivan for obstruction and trespassing.[2] *Id.*

Sullivan is a karate instructor, RP 382–83, a grand master of Isshin-ryu, an Okinawan style of martial arts. RP 502–04. When Higgs reached for Sullivan's right arm, Sullivan pulled his arm away and stepped to Higgs' right. RP 258. Higgs warned Sullivan not to pull away again or he would be arrested for resisting arrest. RP 259. When Higgs again reached for Sullivan, Sullivan moved forward and, with his right hand struck Higgs on the left thigh, just above his knee. RP 260. Higgs slipped as he grabbed Sullivan and tried to take him to the ground. RP 262. Sullivan fell on top of Higgs. *Id.* The two wrestled in the rocks until Higgs got Sullivan under control with his Taser. RP 263–66. During the scuffle, Sullivan told Higgs he had friends videotaping the incident. RP 267.

III. ARGUMENT

A. SULLIVAN HAD ALL FACTS AND EVIDENCE RELEVANT TO THE CHARGE OF RESISTING ARREST FROM THE START OF THE CASE. AFTER THE STATE ADDED THE CHARGE, AND WITH 23 DAYS REMAINING BEFORE HIS OUTSIDE TRIAL DATE, SULLIVAN CHOSE TO GO TO TRIAL WITHOUT FURTHER CONTINUANCE. SULLIVAN DID NOT SUFFER PREJUDICE FROM THE AMENDED INFORMATION.

"The court may permit any information . . . to be amended at any time before verdict or finding if substantial rights of the defendant are not

[2] The State did not charge Sullivan with trespassing.

prejudiced." Criminal Rule of Procedure (CrR) 2.1(d). Sullivan misapprehends the facts of his trial continuance and the rules governing time for trial under CrR 3.3. He cannot prove prejudice.

Sullivan's challenge to the eve-of-trial amendment relies on *State v. Price*, 94 Wn.2d 810, 620 P.2d 994 (1980), a case that has minimal, if any, relevance to the facts here. In *Price*, the State filed an amended information interjecting new facts into the case less than three weeks before expiration of the time for trial period. *Id.* at 814. Trial was continued beyond expiration to allow the defendants time to meet the new allegations. *Id.* The Supreme Court agreed with the defendants that

> *if* the State, through inexcusable lack of due diligence, fails to disclose material facts until shortly before a crucial stage in the litigation process, a defendant may be impermissibly prejudiced by having to choose between the right to a speedy trial or the right to be represented by prepared counsel.

Id. (emphasis added). That is not what happened in *Price*[3] and is not what happened here.

On February 27, 2015 defense counsel suggested trial be continued to April 8, allowing time to resolve various procedural and evidentiary

[3] In *Price*, the Court placed the burden on the defendant to prove by a preponderance of the evidence "that interjection of new facts into the case when the State has not acted with due diligence will compel him to choose between prejudicing either of these rights." 94 Wn.2d at 814. The defendants in *Price* were "unable to shoulder this burden of proof." *Id.* at 815. Their speedy trial rights were not violated. *Id.*

issues. CP 408. Accordingly, on March 2, 2015, the State moved to continue the March 4 trial date to April 8. Sullivan did not object. CP 66. The court set a new outside date of May 8, 2015. CP 67.

On March 31, eight days before trial and 45 days before the outside date, the State filed a motion to amend the information to add the charge of resisting arrest. CP 88. The State asserted "the information should be amended to more accurately reflect the criminal conduct of the defendant." CP 88. All the facts supporting the new charge were included in the discovery produced at the beginning of the case. 4RP 4; CP 413–17. The parties argued amendment at the April 6, 2015 readiness hearing. CP 92. The State asked the court to recall the facts from the February 11, 2015 CrR 3.5 hearing, that Higgs tried to arrest Sullivan "and there was a scuffle that ensued." 4RP 9. The State also told the court its offer had included a plea to resisting arrest. *Id.* Sullivan objected to discussion of plea negotiations and the State asked the court to strike the comment. *Id.* When the court asked when the State first gave notice of its intent to add the charge, the prosecutor replied "that would get into the plea negotiations." *Id.* at 5. The court found "the subject of the lawfulness of apprehension of Mr. Sullivan is close enough to the core of what was charged in the party's [sic] preparation. So that this amendment does not

constitute prejudice to Mr. Sullivan, nor is there another basis upon which the Court would deny the motion." 4RP 11–12.

Sullivan then confirmed he was ready for trial in two days, April 8. 4RP 13. The State told the court it was unlikely this would be the case going to trial on April 8 and that Sullivan had yet to produce some last-minute discovery. *Id.* As the State expected, trial commenced April 15, 2015. RP 1. Defense counsel again affirmed he was ready to try the case. RP 6. The outside date was still 23 days in the future.

Sullivan provides no basis to conclude his constitutional right to speedy trial was violated when he agreed he was ready for trial a month before his outside date. Criminal Rule 3.3[4] authorizes the trial court to continue trial within the prescribed time limits whenever it determines the date should be reset for any reason. Sullivan's reconfirmation of trial readiness three weeks before his outside date strongly suggests lack of prejudice.

Sullivan does not cite to evidence indicating the State used the new charge to get a de facto trial continuance. Both parties told the court they were ready to proceed April 8. The State will not respond to speculation.

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[4] CrR 3.3(d) provides: "(2) *Resetting of trial date.* When the court determines that the trial date should be reset for any reason, including but not limited to the applicability of a new commencement date pursuant to subsection (c)(2) or a period of exclusion pursuant to section (e), the court shall set a new date for trial which is within the time limits prescribed and notify each counsel or party of the date set."

This Court should find the trial court properly allowed the amended information because Sullivan suffered no prejudice.

B. THE STATE ALLEGED SULLIVAN ASSAULTED HIGGS BASED ON EVIDENCE SULLIVAN STRUCK HIGGS ON THE THIGH. AT TRIAL, SULLIVAN ADMITTED OTHER ASSAULTIVE ACTS HE CLAIMED WERE DONE IN SELF-DEFENSE. THE STATE'S *PETRICH* ELECTION PROPERLY INSTRUCTED THE JURY TO RELY ONLY ON THE BLOW TO THE OFFICER'S THIGH, SAFEGUARDING SULLIVAN'S CONSTITUTIONAL RIGHT TO A UNANIMOUS JURY VERDICT.

After both sides rested, the State successfully argued it should be allowed to specify upon which one of several assaultive acts it relied to support the third degree assault charge. RP 936-39. Sullivan misapprehends the nature of the State's act. "When the evidence indicates that several distinct criminal acts have been committed, but defendant is charged with only one count of criminal conduct, jury unanimity must be protected." *State v. Petrich,* 101 Wn.2d 566, 572, 683 P.2d 173 (1984), *abrogated in part on other grounds by State v. Kitchen*, 110 Wn.2d 403, 405-06, 756 P.2d 105 (1988). "The State may, in its discretion, elect the act upon which it will rely for conviction." *Id.* That is what happened.[5] The third degree assault charge remained unchanged from the first information to the conclusion of trial, CP 1, 94, alleging Sullivan "did

[5] When the State chooses not to elect a particular act, the court must instruct the jury all 12 must agree that the same underlying act has been proved beyond a reasonable doubt. *Petrich,* 101 Wn.2d at 572.

assault a law enforcement officer or other employee of a law enforcement agency who was performing his or her official duties at the time of the assault, contrary to RCW 9A.36.031(1)(g)."

Sullivan shows no prejudice from the State's election. He knew from the beginning he was accused of striking a blow to Higgs's thigh. The prosecutor focused on the blow whenever he talked about the assault. At the *Miranda*[6] hearing, he said: "As Officer Higgs went to detain the defendant, there was a wrestle that occurred. The defendant proceeded to resist arrest and ultimately punched Officer Higgs in the thigh." 2RP 6. During Higgs's testimony, the prosecutor asked about statements Sullivan may have made "after being assaulted and during the scuffle", clearly distinguishing the State's view of events. 2RP 15. In the *Miranda* closing argument, he said: "[A]fter the officer tried to arrest him, an argument ensued. And the defendant punched the officer in the leg." 2RP 46. He recounted in his opening trial statement the confrontation between Higgs and Sullivan, telling the jury:

> As [Higgs] goes to grab the defendant's hands again to place them in handcuffs, the defendant raises his arm - - you'll see this in the video - - he swings it down. . . . He swings down and he punches Officer Higgs right in the thigh. As he does that, Higgs grabs him. And then a scuffle ensues. They wrestle on the rocks for a little bit.

[6] *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L.Ed.2d 694 (1966).

RP 174. At trial, defense counsel asked Higgs "what Mr. Sullivan did in regards to striking you." RP 931. Higgs repeated his earlier testimony: "Upon raising his arm, he made a balled fist and then struck me." RP 931-32. Sullivan rested minutes later. *Id.*

The prosecutor correctly characterized the request for a *Petrich* election[7] as a unanimity issue during the jury instruction conference. RP 938. The prosecutor feared the jury might rely on other acts Sullivan had admitted as opposed to the thigh punch, which Sullivan denied. *Id.* The prosecutor argued the State is allowed in these circumstances "to tell the jury what evidence they're supposed to consider." *Id.* The court shared the State's concern, noting Sullivan testified he pulled Higgs's finger and twisted the officer's hand. *Id.* The court wanted no confusion among the jurors and instructed the State to rewrite the elements instruction to specify Sullivan assaulted Higgs by striking Higgs on the thigh.[8] RP 939.

The court approved the election but refused to allow Sullivan to argue the jury should find all the "rest of the stuff"—the finger pull, the hand twist, the rolling around on the rocks—to have been legal based on

[7] The prosecutor did not use the phrase "*Petrich* election" during the conference.

[8] Element (1) of the to-convict instruction, Instruction 11 told the jury it must find, beyond a reasonable doubt, "That on or about April 24, 2014, the defendant assaulted Joseph Higgs on the thigh[.]"CP 322.

the State's reliance on the blow to Higgs's thigh. RP 1027. Sullivan could argue these acts were legal because they were done in self-defense. *Id.*

Until trial, everything that happened between Higgs and Sullivan while wrestling on the rocks was referred to as a scuffle or as wrestling. Failure to make a *Petrich* election after Sullivan admitted other specific assaultive acts could have led to reversal on review. "Washington law requires that either the State elect the act upon which it will rely for conviction, or that the trial court instruct the jury that all jurors must agree that the same underlying criminal act has been proven beyond a reasonable doubt." *State v. Noltie*, 116 Wn.2d 831, 843, 809 P.2d 190 (1991) (emphasis in original omitted). Whether to elect an act is entirely up to the State. *Petrich*, 101 Wn.2d at 572.

That the *Petrich* election may have hampered Sullivan's self-defense argument does not exempt the court or the State from following procedures held necessary to ensure a unanimous verdict. This Court should reject Sullivan's challenge to the State's *Petrich* election.

C. THE TRIAL COURT PROPERLY DENIED SULLIVAN'S MID-TRIAL MOTION TO DISMISS THE RESISTING ARREST CHARGE BECAUSE IT WAS SUPPORTED BY SUFFICIENT EVIDENCE. THE COURT PROPERLY REFUSED TO GIVE SULLIVAN'S PROPOSED JURY INSTRUCTION BECAUSE IT MISSTATED THE LAW.

Sullivan had no basis for his dismissal motion. Higgs decided to arrest Sullivan for trespassing and obstruction because Sullivan refused to

produce identification after Higgs repeatedly said the area was restricted and Sullivan refused to leave. RP 257–58. The court took Sullivan's motion under advisement. RP 684. Sullivan does not cite to subsequent discussion or to the court's eventual ruling denying his motion.

This Court should refuse to consider "in isolation"—without surrounding facts and circumstances—whether refusal to provide identification is sufficient to support conviction for obstructing a law enforcement officer. Br. of Appellant at 18. This is not a case where Higgs approached Sullivan in a place Sullivan had a legal right to be and demanded identification for no apparent reason. Sullivan knew Higgs was a police officer performing his official duties. Sullivan knew Higgs wanted to write him a "trespass warning" documenting notice that the area below the dam was off limits. Sullivan refused to produce identification and demanded a federal marshal. RP 257. At that point, Higgs had probable cause to arrest Sullivan for obstructing and for trespassing. When Higgs tried to take control of Sullivan, Sullivan pulled away. RP 258. Higgs warned Sullivan not to pull away or he would be arrested for resisting arrest. RP 259. Higgs reached for Sullivan a second time and Sullivan struck Higgs on the thigh. RP 260.

The essential elements of an obstruction charge are: (1) that the action or inaction in fact hinders, delays, or obstructs; (2) that the

hindrance, delay, or obstruction be of a public servant in the midst of discharging official duties; (3) the obstructor's knowledge that the public servant is discharging official duties; and (4) that the obstructor knowingly perform the action or inaction. *State v. CLR*, 40 Wash. App. 839, 841–42, 700 P.2d 1195 (1985); RCW 9A.76.020(1). Those elements were met.

The court also properly denied Sullivan's proposed jury instruction asserting "Defendant cannot be arrested for obstructing a law enforcement officer by refusing to give law enforcement his identification." CP 174. Under the facts here, it was an improper statement of the law. The argument is undeveloped in Sullivan's brief, where he refers the Court to his copious endnotes and to "CP 174 for Legal Basis." Br. of Appellant at 18. Briefs must contain "argument in support of the issues presented for review, together with citations to legal authority and references to relevant parts of the record." RAP 10.3(a)(6). "Passing treatment of an issue or lack of reasoned argument is insufficient to merit judicial consideration." *Holland v. City of Tacoma*, 90 Wn. App. 533, 538, 954 P.2d 290 (1998) (citing *State v. Johnson*, 119 Wn.2d 167, 171, 829 P.2d 1082 (1992)). This Court should decline to consider Sullivan's glancing attack on the court's refusal to give an erroneous jury instruction.

D. THE TRIAL COURT PROPERLY GAVE THE JURY A SPECIAL INTERROGATORY ASKING WHETHER HIGGS HAD PROBABLE CAUSE TO ARREST SULLIVAN FOR TRESPASSING,

ASOBSTRUCTING, OR THIRD DEGREE ASSAULT BECAUSE THE FORM MEMORIALIZES THE VOTE ON EACH ALTERNATIVE AND ENSURES A JUST RESULT SHOULD THIS COURT DETERMINE INSUFFICIENT EVIDENCE SUPPORTED ANY ONE OF THEM.

At the State's request, over Sullivan's objection, the trial court gave a special interrogatory to be used if the jury found Sullivan guilty of resisting arrest. CP 339. "Special Verdict–Form A" required the jury to answer whether Higgs had probable cause to arrest for second degree criminal trespass, for obstruction of a law enforcement officer, and assault in the third degree. *Id.* The jury answered "yes" to all three. *Id.*

A criminal defendant is entitled to a unanimous jury verdict. *State v. Smith*, 159 Wn.2d 778, 783, 154 P.3d 873 (2007); U.S. CONST. amends. VI, XIV; WASH. CONST. art. I, § 2. When a crime could be committed by more than one alternative means, the State must produce substantial evidence to support each of those means. *State v. Scott*, 145 Wn. App. 884, 894, 189 P.3d 209 (2008). Although the jury must be unanimous concerning guilt of the charged crime, there is no right to unanimous determination as to each of the alleged alternative means so long as each is supported by substantial evidence. *Id.* Still, Washington courts find it "desirable to determine whether the jury is unanimous on one of the alternative means in the event of reversal for insufficiency of the evidence. *Id.* (citing *State v. Fortune*, 128 Wn.3d 464, 467, 909 P.2d 930 (1996)).

Sullivan's arrest was lawful only if Higgs had probable cause to arrest for obstruction, resisting arrest, or third degree assault. RCW 9A.76.040. Nonbinding guidance is found in the "Note on Use" commentary to the lawful arrest definition instruction, 11 WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL 120.07 (WPIC). "In the second sentence [of the instruction], insert the name *of the crime or crimes* for which the arresting officer may have had probable cause. *A separate instruction should be given defining these crimes.*" WPIC 120.07, Note on Use (emphasis added). The jury was given WPIC 120.07, CP 326, and definitions of the three crimes identified in that instruction. CP 320, 330, 331.

During the hearing on Sullivan's post-trial motions, the trial court said the special verdict form was not only appropriate, "it was almost imperative to do that under these circumstances where there were two different crimes where the officer was asserting authority to arrest Mr. Sullivan." RP 1107. The form used here is analogous to the special interrogatory relied on by reviewing courts to determine jury unanimity in alternative means cases and was offered to ensure a just result should a reviewing court determine insufficient evidence supported one or more of the crimes for which Higgs arrested Sullivan. If, for example, the jury acquitted Sullivan of third degree assault and this Court found evidence

insufficient to support probable cause for obstructing, lack of probable cause for trespassing would be fatal to Sullivan's resisting arrest conviction. The special verdict interrogatory removes all doubt.

Other than an unhelpful citation to "RP 966–979," Sullivan does not support his allegation that the interrogatory "confused the jury and led them astray from the real issue" or that "the jury felt they were asked to find Mr. Sullivan guilty of trespass and obstructing an officer." Br. of Appellant at 19. His puzzling comment that the prosecution appeared "more interested in the jury finding a civil lawsuit question" is likewise undeveloped. The State is unable to respond to these arguments.

E. SULLIVAN DOES NOT BUTTRESS HIS ER 404(B) CLAIM WITH FACTUAL ASSERTIONS AND LEGAL ARGUMENTS SUPPORTED BY PARTICULARIZED CITATION TO THE RECORD. THIS COURT SHOULD DECLINE TO REVIEW HIS CLAIM.

Contrary to RAP 10.3(a)(5)[9] and (6),[10] Sullivan fails to support his factual assertions with citation to specific testimony, argument, or rulings from the bench. He alleges generally "the trial court allowed Mr. Mellick,

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[9] RAP 10.3(a)(5) provides: "(a) *Brief of Appellant or Petitioner*. The brief of the appellant or petitioner should contain under appropriate headings and in the order here indicated: -(5) Statement of the Case. A fair statement of the facts and procedure relevant to the issues presented for review, without argument. *Reference to the record must be included for each factual statement.*" (Emphasis added.)

[10] RAP 10.3(a)(6) provides: " - (6) *Argument*. The argument in support of the issues presented for review, together with citations to legal authority and *references to relevant parts of the record*. The argument may be preceded by a summary. The court ordinarily encourages a concise statement of the standard of review as to each issue." (Emphasis added.)

Mr. Fields and others' prior bad acts and opinions . . . to be admitted by the prosecutor without following the required steps under ER 404(b) and case law." Br. of Appellant at 20. Into the middle of that sentence, he plunks down a citation to 54 non-consecutive pages of trial record, then refers generally to an additional 16 consecutive pages at the end. *Id.* He supports his summary of a portion of the prosecutor's argument with a general citation to another eight non-consecutive pages from the trial record and two pages from a pretrial hearing. *Id.* He does not discuss his citations to the record with any particularity. *Id.*

"Reference to the record must be included for each factual statement." RAP 10.3(a)(5). Argument must be supported by "references to relevant parts of the record." RAP 10.3(a)(6). Strict adherence to these rules "is not merely a technical nicety." *In re Estate of Lint*, 135 Wn.2d 518, 532, 957 P.2d 755 (1998). Appellate courts should not and will not "assum[e] an obligation to comb the record with a view toward constructing arguments for counsel[.]" *Id.*

Although Sullivan cites to numerous pages of record, he neglects to identify specific testimony or otherwise develop facts sufficient to determine the merit of his argument. Br. of Appellant at 20–21. He does not refer to any limine motions on the issue. *Id.* He does not identify with any particularity the prior bad acts to which he refers. *Id.* He does not

include the names of all of the witnesses allegedly affected. *Id.* He does not quote the State's argument or cite to where in the record his summary may be verified. *Id.* He does not identify what rulings, if any, the trial court made or cite to judicial comments reflecting the court's analysis. *Id.* He argues juror confusion, for which there is no competent evidence in the record. *Id.* Because ER 404(b) evidentiary errors are not of constitutional magnitude, a reviewing court may apply a harmless error analysis. *See, e.g., State v. Binh Thach*, 126 Wn. App. 297, 311, 106 P.3d 782 (2005). Even that, however, cannot be undertaken here.

It is also impossible to determine the scope of Sullivan's objections. For example, one of the cited single pages, RP 279, is a portion of pre-trial argument with no apparent relevance to "bad acts" evidence. Another contains statements from counsel for one of the witnesses about a confidentiality agreement with no apparent relevance to this case, asking the court to make a record that the witness was ordered to testify. RP 443.

That the court did engage in some sort of balancing is apparent from Instruction No. 7, in which the jury was instructed:

> Certain evidence has been admitted in this case for only a limited purpose. This evidence consists of Tyler Mellick's contacts with law enforcement on April 20 and 21, 2014, Tyler Mellick's current civil litigation involving the Grand Coulee Police Department, and Tyler Mellick and Robert Fields' personal opinions regarding the propriety of law enforcement officers who have been commissioned by

> Washington State to enforce laws on federal property. This evidence may be considered by you only for the purpose of witness credibility. You may not consider it for any other purpose. Any discussion of the evidence during your deliberations must be consistent with this limitation.

CP 318. Further difficulty is found in the fact that on the first day of trial, the parties stated they had reached agreement about Tyler Mellick's testimony. RP 156–57. Defense counsel said: "I think we have kind of a meeting of the minds what the problem is." RP 156. The prosecutor agreed and outlined what testimony he intended to elicit. RP 157. The court said: "If something comes up, we can talk about it." *Id.* Defense counsel responded: "Yes. That's kind of what my only problem was, was the other stuff." *Id.* Sullivan did not cite those pages. Br. of Appellant at 20–21. While the exchange is not dispositive, it illustrates the difficulty of addressing an issue in the absence of particularized citation to the record sufficient to allow a fair response and consideration by this Court. This Court should decline to consider Sullivan's ER 404(b) argument.

F. SULLIVAN OFFERED TO FOREGO A CIVIL SUIT AGAINST THE GRAND COULEE POLICE DEPARTMENT IF THE STATE WOULD DISMISS CRIMINAL CHARGES. THE STATE, AFTER CONSIDERATION, DECLINED. THE TRIAL COURT CORRECTLY DENIED SULLIVAN'S POST-TRIAL CrR 8.3 DISMISSAL MOTION BECAUSE IT FOUND NO EVIDENCE THE STATE ENGAGED IN THE MISCONDUCT SULLIVAN ALLEGES HERE.

Sullivan's claim of prosecutorial vindictiveness is frivolous. Nothing in the record supports his uncited allegation that the prosecutor

told a juror the State pursued criminal charges to prevent Sullivan from filing a civil suit. The record does contain evidence refuting Sullivan's claim the State offered to dismiss charges in exchange for Sullivan's waiver of his right to seek civil damages.[11]

Deputy prosecutor Ryan Valaas signed the initial May 30, 2014 information charging Sullivan with third degree assault. CP 1–2. Deputy prosecutor Kiel Willmore eventually tried the case. RP 1. On March 27, 2015, Willmore sent an email to defense counsel responding to counsel's inquiries on a variety of topics. CP 366. Willmore's last paragraph addressed the parties' on-going settlement discussions. He wrote:

> On a side note, I need to research some case law about the propriety of dismissing a case with an agreement by the defense that they won't pursue a civil claim against another party. You told me that your client was not going to press a civil suit. You said that, however, with a little uncertainty in your voice. Perhaps the best thing to do with this case is dismiss it with an agreement no suits will be filed from Mr. Sullivan against any of the other parties involved.

CP 366. Defense counsel attached a copy of this email to Sullivan's post-trial motions for new trial and arrest of judgment. CP 366. The State's response to these motions, CP 390–420, included Willmore's declaration disputing or placing into context certain factual allegations Sullivan made

[11] Sullivan supports his argument with reference to an email from the prosecutor identified by the parenthetical notation "(attached)". The brief does not quote the language of the email. The email can be found in the clerks papers at CP 366. The State cites to the clerk's papers.

below and reiterates here. CP 418–20. Willmore said he took over the case in early 2015. CP 419. He said defense counsel visited his office before trial, asking whether the State would be willing to dismiss the case in exchange for counsel's oral promise Sullivan would not file a civil complaint against the Grand Coulee Police Department. *Id.* After sending the March 27 email on which Sullivan now relies, Willmore did his promised research and discovered release-dismissals, while permitted, are frowned upon by reviewing courts. *Id.* He ultimately "decided not to move forward with such an agreement." *Id.*

In light of Willmore's expression of concern and subsequent research, it is illogical to conclude the State initiated this offer. The trial court agreed. RP 1105. At the post-trial hearing on Sullivan's motion the trial court stated it "would be wrong" and "there might be some problems" if the State had threatened Sullivan with criminal charges in order to obtain a waiver of his rights to civil damages or had offered to dismiss charges in exchange for the same thing, "[b]ut I don't think that's what happened in this case." RP 1104. The court noted Willmore's concern about ethical implications and the fact the offer was not made, concluding, "the record is very clear that Mr. Willmore did not engage in misconduct in that way." RP 1104–05. The court's analysis was correct. This Court should deny the claim.

G. THE TRIAL COURT CORRECTLY FOUND SULLIVAN FAILED TO SHOW THE STATE OR ITS AGENT TAMPERED WITH VIDEO EVIDENCE PRODUCED IN DISCOVERY. A WORK ORDER SHOWING THE BUREAU ORDERED NO-TRESPASSING SIGNS SIX DAYS AFTER SULLIVAN'S ARREST IS NOT EXCULPATORY.

Nothing cited in the record[12] supports Sullivan's assertion that the trial court allowed the State to "suppress" all best quality video evidence and to withhold other exculpatory evidence. The gravity of Sullivan's claim demands response.

1. Suppression of "best quality" video

Defense counsel wrote an email to the prosecutor February 27, 2015, suggesting they continue trial to April 8 to deal with a number of matters, including "stipulat[ing] to the videos and exhibits." CP 408. On March 6, he sent another email, entitled: "Would You Stipulate to Videos I Received from Discovery and Officer?" CP 409. Counsel's concern was lack of cooperation from the dam's employees. *Id.* On March 27, counsel asked again that the State stipulate "to the video which I received from you[.]" CP 410. If the State refused, his media expert would "come in to testify about the thumb drive and the video so they can be admitted." *Id.*

[12] Sullivan cites to "RP 1074–1071." The record at RP 1074–79 concerns post-trial entry of findings and conclusions from the CrR 3.5 hearing. Argument regarding the video evidence starts at RP 1081. Sullivan also supports his assertions with citation to CP 343–66, his unsuccessful post-trial motion for new trial and arrest of judgment with its proposed order requiring production of "best quality" surveillance videos.

Counsel wrote: "You should not be concerned about admitting your own video so I cannot understand why this is such a problem . . . ." *Id.*

At the March 31 pre-trial hearing, counsel demanded the State agree to admit all video evidence without necessity of authentication by dam personnel, who had refused to accept subpoenas from Sullivan's investigator. 3RP 5. Counsel argued: "there's a video in there that is vital to our case. Well, I'm just trying to get the prosecutor to agree to admit the video then. The dam is the one who gave it to the prosecutor. I can't even interview the person who made the video." 3RP 4. Counsel demanded the State agree to admit all video evidence without authentication by dam personnel. 3RP 5. The prosecutor confirmed all known footage of the incident had been produced. 3RP 11.

Defense counsel also told the court: "We have information that they recorded it at 100 frames per second. . . . And my request for this recording, they recorded it at the lowest they could, like 20 to 30 frames per second. And two-thirds of it is missing." 3RP 15. Counsel did not say where this information came from. *Id.* He expected it would take one or two weeks to obtain technical information about the videos, then made it clear Sullivan would not agree to even a one-week continuance of the April 8 trial date for that purpose. 3RP 16–17. Frustrated, the court bluntly pointed out the parties had done nothing about the issue "until it's too

late." 3RP 17. The court asked defense counsel why this had not been addressed three months earlier, "so that we could do it consistent with a reasonable trial date[.]" *Id.* He continued: "It's impossible. We want a whole bunch of stuff to happen involving federal employees who serve at a national security site. And we wanted it all to happen within a week. I don't have any magic wand." 3RP 17–18. Sullivan clarified: "So all I wanted to do was get the prosecutor to agree, let's just admit the video, go to trial next week." 3RP 19. The State expressed reservation about stipulating, pointing out Officer Higgs could authenticate the videos. 3RP 19–20. With that, defense counsel stated he would be ready to go to trial the following week. 3RP 21.

In closing argument, Sullivan asserted for the first time[13] "the video" was suspect. RP 1029. Sullivan told the jury the cell phone video appeared to be better quality than the Homeland Security video. *Id.* Why, he asked, was the Homeland Security video so blurry during the time that would show whether Sullivan hit Higgs? *Id.* He told the jury to pay attention to the fact "that the river is not even moving for like 30 frames. Why? Why is it missing?" *Id.* The answer he proposed was: "Because Mr. Sullivan's telling you the truth." *Id.*

[13] The State has not been able to find evidence Sullivan raised this issue earlier, either at trial or in any pretrial hearing.

In the post-trial hearing on Sullivan's motion for a new trial, defense counsel alleged, again for the first time, "this goes far beyond not just giving discovery. This goes - - this goes to someone and a video that has been altered, there's 35 frames missing . . . ." RP 1084. Counsel identified the video as the one in which Sullivan's arm can be seen up above his head and going down. RP 1085. The court noted counsel had known of the missing frames before trial. RP 1086. Counsel responded: "Judge, I knew also about the whole thing, yes I did." *Id.* He said he relied on the "prosecutor numerous times, the record will reflect this is the best video they have, this is the video." *Id.* He alleged tampering by an unspecified party. RP 1087. He asked the judge to "order the video unenhanced, unmessed with, not tampered with . . . ." RP 1087.

Calling the evidence "tainted," counsel argued that although the prosecutor did not alter the video, he should have "gone the extra mile" to ensure Sullivan had what he claimed to be exculpatory evidence. RP 1088. He asserted, "they released a good video and somewhere down the line we're alleging that it got changed." RP 1090. He asked the court for an order to the Department of Interior to release the good video." *Id.* He argued a new copy would show *whether* the video introduced at trial had been tampered with. RP 1091. The court asked what evidence supported his assertion the tape was tampered with. *Id.* Counsel said it was a grainy

Homeland Security video that, according to his expert, appeared to be copied at a very low frame rate after having been originally developed at a far higher speed. *Id.* The prosecutor pointed out the video referred to must be the cell phone video taken by a civilian witness to the incident[14] because none of the security videos produced by the dam showed Sullivan's arm go up and down. RP 1095.

The court agreed it would have a duty to look into tampering if there were any indication of that, "[b]ut here there's nothing." RP 1097. Reference to an unnamed source did not provide sufficient evidence of tampering. RP 1097–98. The court refused to order the prosecutor's office to turn over something not in its possession and questioned "under these circumstances whether there's a basis to direct the Bureau to do anything." RP 1098. Later, the court said:

> I went back and looked at the file and the difficulties that the parties had in getting all these additional tapes from the Bureau, the prosecution I think was very diligent in seeking to find all of this evidence, and if there was a problem with these videos we got from the Bureau, the problem is with the Bureau.

RP 1105. This Court should affirm the trial court's refusal to entertain Sullivan's unsubstantiated allegation of evidence tampering.

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[14] Defense counsel was correct to believe there was another copy of the video showing Sullivan's arm rising and falling "out there" somewhere. A copy of the witness's cell phone video was uploaded to YouTube on April 28, 2014, four days after the incident. https://www.youtube.com/watch?v=CkYucpBS0ik

2. Brady violation: withholding exculpatory evidence

Sullivan claims the State withheld exculpatory evidence when it did not produce the work order or other evidence showing the Bureau ordered no-trespassing signs on April 30, 2014, six days after Sullivan's arrest. This Court should refuse to entertain Sullivan's alleged *Brady*[15] violation for the reasons stated in the State's response to Sullivan's personal restraint petition in section K.

H. THE RECORD CITED IN SUPPORT OF SULLIVAN'S SIX ALLEGATIONS OF PROSECUTORIAL MISCONDUCT IS EITHER INSUFFICIENT FOR FAIR ANALYSIS OF THE ISSUE OR CONTAINS EVIDENCE REFUTING SULLIVAN'S CLAIMS. THIS COURT SHOULD DECLINE TO REVIEW THE UNSUPPORTED ALLEGATIONS AND FIND THE PROSECUTOR'S ACTIONS IN THE REMAINING ALLEGATIONS DID NOT PREJUDICE SULLIVAN.

Sullivan asserts the trial court improperly allowed the prosecutor to commit misconduct in six separate ways during trial and closing argument. Br. of Appellant at 38–39. He claims the prosecutor expressed his personal opinion on evidence and testimony, argued the prior bad acts of others, argued from a "late amendment" to the information, took unfair advantage of frames missing from video evidence, mocked Sullivan in a disgusting tone of voice, and made improper comments on the evidence.

[15] *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L.Ed.2d 215 (1963).

For some of these allegations, Sullivan fails to provide a "fair statement of the facts and procedure relevant to [the] issue." RAP 10.3(a). The State responds when it can fairly determine the specific comments objected to.

1. Expressing personal opinion on evidence and testimony

During closing argument, the prosecutor said:

> I don't think the defendant when he went down there intended to assault Officer Higgs. But that was the result. I don't think he went down there thinking, I'm going to get in a fight with an officer today. At least not a physical one. But he did intend to engage Officer Higgs in a confrontation.

RP 998–99. Sullivan promptly objected to "I think" as a personal opinion. *Id.* The prosecutor clarified to the jury: "I'm characterizing the defendant thinking that, not me thinking that the defendant thought that." *Id.* The court thanked him for the clarification and the prosecutor continued: "The defendant's thinking, I'm going to get in a confrontation." RP 999. Sullivan does not identify how he was prejudiced by the prosecutor saying he did not think Sullivan went to the dam intending to assault Higgs. Regardless, counsel's objection and the State's clarification cured any potential harm.

2. Arguing the prior bad acts of others

The State incorporates its argument from section E, above, also addressing Sullivan's claims of inadmissible "bad acts" evidence.

Sullivan's citations to the record do not specify either the alleged bad acts or the "others" who committed them. Although the prosecutor's misconduct is alleged to have occurred during closing argument, Sullivan cites generally to a pretrial limine hearing, (RP 30–37), 75 consecutive pages of trial record covering some, but not all, testimony of two witnesses and related arguments to the court, (RP 443–518), one page from the jury instruction conference, (RP 943), and two pages from the State's closing argument, (RP 996–97). Sullivan does not cite to the trial court's rulings on his "bad acts" limine motion. The cited record shows the court admitted some of the testimony of some of Sullivan's witnesses because the prosecutor said: "I don't want to be as general as possible, because not all of that testimony is limited." RP 943.

Sullivan does not specify which of the prosecutor's statements violated what limine ruling. Anything the prosecutor argued from admitted evidence cannot be considered misconduct. Sullivan's failure to identify the specific statements to which he objects and to rulings of the court allegedly violated precludes assessment of the merits of his claim. This Court should decline to review this allegation.

3. Arguing from a late amendment to the Information

The State refers the Court to its argument in section B above concerning the State's *Petrich* election. The trial court approved the *Petrich* election over Sullivan's objection. There was no misconduct.

4. Taking unfair advantage of the missing frames in the furnished videos

The State refers the Court to its argument in section G, above. None of the pages Sullivan cited in this section of his brief refer to missing frames or the trial court's ruling on that issue. Neither does Sullivan identify how the State took unfair advantage of the missing frames. This Court should decline to review the allegation.

5. Mocking to the jury in a disgusting voice

It is unfortunate the record does not include courtroom audio supporting Sullivan's remarkable claim that the prosecutor "mock[ed] to the jury in a disgusting voice and words that he said Mr. Sullivan sounded like during the conspiracy allegations." Br. of Appellant at 39. He claims the prosecutor used "a baby voice demeaning and prejudicing Mr. Sullivan." *Id.* Circumstantial evidence refutes this. On one of the pages to which Sullivan cites,[16] the prosecutor argued Sullivan was not really

[16] The other page cited for this argument, RP 1049, does not contain anything related to the prosecutor's comments. The State assumes Sullivan intended to cite to RP 1040 and responds as though he had.

fishing, he "was just waiting for Officer Higgs to show up." RP 1039. "Just waiting for that confrontation so that he could show he had a right, *I've got a right, this is my right, I've got my buddies videotaping this.*" *Id.* (emphasis added). "When [Higgs] finally got the defendant on his knees, and they were wrestling around there, the defendant says, *you'd better be careful. I've got two of my guys videotaping this.*" *Id.* (emphasis added). Defense counsel objected: "Your Honor, I'd object to the way he's stressing and how vulgar type of language he's using and also the way he's describing it to the jury. He doesn't have to be that demeaning." *Id.* This exchange followed:

COURT:	"But he has latitude in arguing the case." *Id.*
DEFENSE:	"He doesn't have to talk like that, judge." *Id.*
COURT:	"Well, I'm not going to sustain - -" *Id.*
DEFENSE:	He acts like Mr. Sullivan talks like that, he doesn't." *Id.*
COURT:	"At this point, the objection is overruled. Please continue." *Id.*

A short while later, the prosecutor discussed security video evidence, saying: "Now, [defense counsel] has concocted a theory pretty much that this was intentionally altered - -". RP 1040. Sullivan objected. The court said: "I don't think he's crossed the line at this point. Go ahead." *Id.* The prosecutor continued arguing that the problem with

security videos was "because this has been filmed probably fewer frames per second." *Id.* These exchanges took place during the State's rebuttal closing. The State's assumption that these are the rebuttal closing comments to which Sullivan refers is supported by the trial court's comment at the post-trial dismissal hearing: "The rebuttal, I am sorry, I was there, I don't recall the tone that you've asserted here, [Counsel], so I'm not going to find that there was improper argument on rebuttal, either." RP 1106. This refutes Sullivan's subjective claim that the prosecutor employed a demeaning tone of voice.

6. Testifying and commenting on testimony

Sullivan misunderstands the nature of the prosecutor's interruption of Sullivan's trial testimony: "Stop right there. Stop right there. For the record, your Honor, the defendant is closing - - . . . - - his right fist." Br. of Appellant at 41 (citing RP 855). The comment was a verbal description for the record of a soundless event relevant to Sullivan's defense.

Defense counsel said in opening Sullivan had "arthritis in his hands for several years, can't even make a fist. He broke his little finger. He can't even make a fist. It would break his hands." RP 188. Sullivan's nurse testified to her opinion that Sullivan "had limitations making a fist back in 2014." RP 618. She said he had difficulty bending his fingers. RP

619. She said bending his fingers into a fist would have been painful. RP 623. She concluded: "I don't think he could make a fist." RP 633.

Outside the presence of the jury, the court addressed the prosecutor's description of Sullivan's hand:

> I did not want to say this in front of the jury, but it appeared to me that Mr. Sullivan both yesterday and today in demonstrating what had happened on the banks of the river on the 24th appeared to make what appeared to be a closed fist, he was closing his fingers down over his hands. . . . That was on display to the jury, I didn't want to say that to the jury because of the nature of it. But that appeared to be the record.

RP 859–60. The prosecutor did not "testify" as he described visual evidence for the record. The court correctly confirmed the accuracy and propriety of his description outside the jury's presence. The record on this appeal would be incomplete without the prosecutor's comment and the court's confirmation. There was no misconduct.

I. SULLIVAN DOES NOT IDENTIFY THE PRECISE JUDICIAL COMMENTS TO WHICH HE ASSIGNS ERROR NOR DOES HE SPECIFY HOW A PARTICULAR COMMENT VIOLATED HIS CONSTITUTIONAL RIGHT TO A FAIR TRIAL. THIS COURT SHOULD DECLINE TO CONSIDER SULLIVAN'S PASSING, UNSUPPORTED TREATMENT OF THIS ASSIGNMENT OF ERROR.

"Mr. Sullivan claims that the constant judicial comment after comment during the trial in front of the jury was very prejudicial to him." Br. of Appellant at 44. Here, again, Sullivan's brief omits any "fair statement of the facts and procedure relevant to this issue." RAP 10.3(a).

He argues the judge showed bias and favored the prosecution's case "numerous times," citing: "Vol 2 and 3, RP 476, 485-486, 491, 505, 512, 516, 518, 521, 524, 535, 541, 597, 855." *Id.* at 42. He does not identify the allegedly prejudicial comments contained in those 14 pages, nor does he present argument targeted toward specific statements.

"The appellate court will only review a claimed error which is included in an assignment of error or clearly disclosed in the associated issue pertaining thereto." RAP 10.3(g).[17] "Passing treatment of an issue or lack of reasoned argument is insufficient to merit judicial consideration." *Holland, supra,* 90 Wn. App. at 538. This Court should decline to consider Sullivan's passing, unsupported treatment of this issue.

J. AFTER HIGGS GOT SULLIVAN UNDER CONTROL, SULLIVAN VOLUNTEERED STATEMENTS ELICITING A RESPONSE FROM HIGGS. THE RESPONSE PROMPTED ADDITIONAL INCRIMINATING STATEMENTS FROM SULLIVAN. SULLIVAN LATER AGREED TO TALK WITH HIGGS AFTER RECEIVING *MIRANDA* WARNINGS. THE COURT ADMITTED ALL SULLIVAN'S STATEMENTS, CORRECTLY CONCLUDING THEY WERE KNOWING AND VOLUNTARY.

[17] RAP 10.3(g) provides: "Special Provision for Assignments of Error. A separate assignment of error for each instruction which a party contends was improperly given or refused must be included with reference to each instruction or proposed instruction by number. A separate assignment of error for each finding of fact a party contends was improperly made must be included with reference to the finding by number. The appellate court will only review a claimed error which is included in an assignment of error or clearly disclosed in the associated issue pertaining thereto."

Sullivan challenges the trial court's Conclusion of Law 3.3: "By stating defendant was stupid for going to jail over fish, Officer Higgs did not intend, nor did defendant understand them to be, an attempt to elicit an incriminating response in violation of defendant's right to remain silent." Br. of Appellant at 47 (referring to CL 3.3 at CP 425). Sullivan asserts all his statements to Higgs were "in response to the officer's words or actions that the officer should know was reasonably likely to elicit an incriminating response." Br. of Appellant at 44. Not all of them were.

Sullivan made a number of statements to Higgs, both before and after *Miranda* warnings. His first came immediately after Higgs encountered him on the riverbank and told him the area was restricted. 1RP 250. Sullivan produced paperwork he claimed proved he could be where he was. *Id.* The next statement came while the two men were still rolling around on the rip rap and Sullivan told Higgs he had friends video recording the incident. 2RP 15–16. The third statement came after Sullivan was under control, handcuffed, and on his feet, when Higgs started gathering up various items scattered during the struggle. 2RP 16. Sullivan said: "I'm sorry I made you do that. Nobody should be made to do that." 2RP 17–18, 34. Higgs replied: "That was stupid. You're going to jail over a fish." 2RP 36. Sullivan responded: "I'm sorry, I made you beat me up." 2RP 35. They were still at the riverbank. 2RP 36. According to

Sullivan, Higgs said: "That was stupid" multiple times. *Id.* The one question Higgs asked before they got back to his patrol car was whether Sullivan needed medical attention. 2RP 18. Sullivan said he did not. *Id.*

Higgs gave Sullivan *Miranda* warnings at his patrol car. 2RP 19. Asked whether he understood the warnings, Sullivan responded: "Yep. I fucked up. I shouldn't have done that." 2RP 20. Higgs said Sullivan did not invoke his right to remain silent or ask for an attorney from the time of first contact at the foot of the dam to the end of the interview at the police station. 2RP 24. The court found Higgs's version more credible than Sullivan's. 2RP 58.

The trial court made 13 findings of fact following the CrR 3.5 hearing. CP 424–25. Sullivan does not challenge any these. Br. of Appellant at 44–47. "Unchallenged findings of fact, including those made during suppression hearings, are binding on appeal." *State v. Daniels*, 160 Wn.2d 256, 261, 156 P.3d 905 (2007). *Miranda* claims present issues of law requiring de novo review. *Id.*

The court found, among other facts, that during the attempted arrest Sullivan told Higgs he had two friends recording the incident. CP 424–25. After being placed in handcuffs, Sullivan repeatedly apologized for his actions and denied medical treatment. CP 425. Higgs read Sullivan the *Miranda* warnings and Sullivan responded, "I fucked up. I shouldn't

have done that." *Id.* Higgs asked again whether Sullivan understood his rights and Sullivan responded he did and that he was willing talk about the incident. *Id.* According to Sullivan, he stated a single "no" in response. *Id.* Sullivan's "testimony regarding his response to his Miranda rights [was] not credible based on [his] previous statements, actions, and conduct in relation to the arrest." *Id.* On the way to the police station, Sullivan said he used to work for the dam and did not see the posted signs or barricades on the roadway. *Id.* At the police station, Sullivan repeatedly apologized for the incident and said he "starts to lose it" when he gets cornered. *Id.* The court orally stated: "Mr. Sullivan was properly advised of his rights, acknowledged that, and was willing to speak with the officer." 2RP 58. "[T]he statements at the station were voluntary and not the product of interrogation." *Id.* "Here, there is no suggestion of any other coercion other than the fact that Mr. Sullivan was detained and being interrogated at the station. So the warnings are sufficient, then, to remove any coercive taint from those statements." 2RP 59. The court concluded "trial should include the statements attributed by Officer Higgs to Mr. Sullivan. They are found by the Court to have been voluntarily made." 2RP 59.

The court ruled Sullivan's voluntary statements included what he said before Higgs secured his arrest, including his initial assertion he had done nothing wrong and his refusal to leave the area after Higgs told him

it was restricted. CP 424–25. Also admissible were Sullivan's repeated refusals to produce identification and the statement about friends recording the incident. *Id.* The court concluded Sullivan's pre-*Miranda* apologies and denial of medical assistance were voluntary. CP 425.

At issue is the voluntariness of Sullivan's apologies and admissions made after Higgs's comment and before the *Miranda* warnings. Whether an officer is engaged in "interrogation" is a mixed question of law and fact. *In re Pers. Restraint of Cross*, 180 Wn.2d 664, 681, 327 P.3d 660, 673 (2014) (citing *United States v. Poole*, 794 F.2d 462, 465 (9th Cir. 1986)). Whether Higgs saying Sullivan was stupid for going to jail over fish was functionally equivalent to interrogation depends on (1) whether Higgs should have known his statements were reasonably likely to elicit an incriminating response; and (2) whether telling Sullivan what he did was stupid reflects a measure of compulsion above and beyond that inherent in custody. *State v. Birnel*, 89 Wn. App. 459, 467, 949 P.2d 433 (1998) (citing *State v. Richmond*, 65 Wn. App. 541, 545-46, 828 P.2d 1180 (1992), *review denied*, 138 Wn.2d 1008, 989 P.2d 1141 (1999)). Focus is on Sullivan's perceptions rather than the officer's intent in making the challenged statement. *Rhode Island v. Innis*, 446 U.S. 291, 301, 64 L. Ed. 2d 297, 100 S. Ct. 1682 (1980).

Cross, *supra*, illustrates the importance of the defendant's perceptions. Cross was arrested for brutally murdering his wife and two of her three teenage daughters. 180 Wn.2d at 675. He then kept the youngest child "confined at knifepoint for five hours while he drank wine and watched television." *Id.* The child escaped and Cross was arrested without incident. *Id.* After invoking his *Miranda* rights twice, Cross reiterated: "I don't want to talk about it." *Id.* at 679. One of the officers who heard that statement offered Cross a glass of water and said: "Sometimes we do things we normally wouldn't do, and we feel bad about it later." *Id.* Cross replied: "I fucking had it. How can you feel good about doing something like this. I can't find a job, they want a thousand dollars in fucking child support. I fucking had it. And my ex-wife is fucking lucky, because she was next on the list." *Id.* The same officer approached Cross later and asked if he wanted to "talk about it," and Cross repeated his earlier statement. *Id.* The Court found the officer's statement made directly to Cross when the officer could tell he was upset was evocative because it referred to the killings which had just occurred, even if the officer's intent was to express sympathy. *Id.* at 686. The comment, implying Cross committed the murders, was reasonably likely to elicit an incriminating response. *Id.* "[W]hile there was no express questioning, [the officer]

subjected Cross to the 'functional equivalent' of questioning." *Id.* (citing *Innis, supra.* 446 U.S. at 302.)

Higgs's "stupid" comments likewise implied Sullivan had done something criminal, but here the crimes were assaulting an officer and resisting arrest, acts done in Higgs's presence in front of a number of witnesses. Higgs could not have thought his comment likely to elicit further incriminating evidence from Sullivan.

The nature of the conversation leading up to the incriminating statements is also relevant. *State v. Willis*, 64 Wn. App. 634, 637, 825 P.2d 357 (1992). Willis's incriminating statements came after his community corrections officer questioned him in jail, without *Miranda* warnings, "to learn about Mr. Willis' activities in the community since they last met[.]" *Id.* at 636. The corrections officer continued asking for more detail until Mr. Willis, in custody on unrelated charges, confessed to an entirely new crime. *Id.* The corrections officer's words, actions, and requests for more detail made it "apparent the responses sought would in all likelihood be incriminating." *Id.*

An opposite conclusion was reached in *United States v. LaPierre*, where the defendant, convicted of bank robbery, overheard two officers standing just a few feet away discussing a potential second suspect and told the officers he took full responsibility. 998 F.2d 1460, 1466 (9th Cir.

1993). The Court found no evidence the dialog was an interrogation, either from the conversation itself or its context. *Id.* Later, LaPierre initiated a conversation with the officer guarding him, saying the detectives "never got all the stuff." *Id.* at 1467. The officer, puzzled, asked what he meant and LaPierre offered to split undiscovered money with him. *Id.* The officer replied that the detectives got "all the stuff." *Id.* LaPierre then told the officer to check under the mattress, where the officer found a roll of currency traced to one of the robbed banks. *Id.* The Court found the officer's questions were simply a polite attempt at clarification, "designed to end the dialog, not further it." *Id.*

LaPierre is consistent with *Innis*, the seminal case on this issue. Innis, arrested for robbing a cabbie with an unrecovered sawed-off shotgun, declined to speak his *Miranda* warnings. *Innis*, 446 U.S. at 294. As he sat in the back of a police wagon, three officers discussed among themselves the fact that a school for handicapped children was in the area and "God forbid one of them might find a weapon with shells and they might hurt themselves." *Innis*, 446 U.S. at 294–95 (internal quotations omitted). One of the officers said it would be too bad if a child picked up the gun and maybe killed herself. *Id.* at 295. The conversation took at most a few minutes. *Id.* Innis, concerned about the children, told the officers to turn around and, advised a third time of his *Miranda* rights, took the

searchers to the gun. *Id.* The Rhode Island Supreme Court set aside Innis's conviction, holding he had been subjected to "subtle coercion" that was the equivalent of "interrogation" within the meaning of the *Miranda* opinion. *Innis*, 446 U.S. at 296. The United States Supreme Court disagreed and refused to "construe the *Miranda* opinion so narrowly." *Id.* at 299. *Miranda* addressed the Court's concern that the interplay of interrogation and custody—the interrogation environment—could " 'subjugate the individual to the will of his examiner' and thereby undermine the privilege against compulsory self-incrimination." *Id.* (internal quotation marks omitted). *Id.* (quoting *Miranda*, 384 U.S. at 457–58). The Court concluded Innis was not "interrogated." *Id.* at 302. The dialog between the officers did not include any express questions to Innis and Innis was not subjected to the "functional equivalent" of questioning. *Id.* The officers had no indication Innis was particularly susceptible to an appeal to his conscience or knew he was particularly disoriented at the time of his arrest. *Id.* "The case boil[ed] down to whether, in the context of a brief conversation, the officers should have known that [Innis] would be moved to make a self-incriminating response." *Id.* The Court noted the entire conversation consisted of a few offhand remarks and was not a situation where "the police carried on a lengthy harangue in the presence of the suspect." *Id.* The officers comments were not particularly

"evocative." *Id.* Thus, "[t]he Rhode Island Supreme Court erred, in short, equating 'subtle compulsion' with interrogation." *Id.* The fact that the officers' comments "struck a responsive chord" demonstrated Innis was subjected to "subtle compulsion." That, however, "is not the end of the inquiry. "It must also be established that a suspect's incriminating response was the product of words or actions on the part of the police that they should have known were reasonably likely to elicit an incriminating response. This was not established in the present case." *Id.* at 303.

This case is more like *Innis* than *Cross*. Sullivan was the first to speak after Higgs got him under control, and the first thing he did was apologize. At that point, the damage to Sullivan's eventual theory of self-defense was done. Higgs could not have expected his own response—that what Sullivan did was stupid—to elicit anything more incriminating than the apology Sullivan blurted out as Higgs gathered up their possessions.

This Court should affirm all Sullivan's statements were knowing and voluntary, and properly admitted at trial.

K. EVIDENCE THE DAM ORDERED NO-TRESPASSING SIGNS FOLLOWING SULLIVAN'S ARREST IS IRRELEVANT TO HIS GUILT ON EITHER CHARGE AND TO HIGGS'S CREDIBILITY. REMAND TO SUPERIOR COURT FOR A REFERENCE HEARING IS NOT REQUIRED. (PERSONAL RESTRAINT PETITION)

Higgs testified to the location of no-trespassing signs along the route from the public parking lot to where Sullivan was fishing. RP 251.

There were posted no-trespassing signs in the parking lot and on the metal vehicle gate spanning an access road from the parking lot down toward the river. RP 252. Higgs returned to the dam after arresting Sullivan and took photographs of existing no-trespassing signs, admitted as trial exhibits 45 and 50 through 54. RP 253–54. Higgs testified the signs had been up as long as he had been with the Grand Coulee Police Department. RP 371–72. Security response force officer Roland testified signs were in place before the day Sullivan was arrested. RP 221. Corey Anderson, another security response force officer at the dam, RP 224, testified that on the date of the incident, no-trespassing signs were posted along the access road leading to where Sullivan was fishing. RP 228.

Defense witness Robert A. Fields testified he was recently retired from 23 years of employment at the dam. RP 412. Fields had been friends with Sullivan for 25 years. RP 413. Fields testified there were no signs restricting access on the riverbank. RP 465. He admitted there were signs at the access gate. RP 469. Fields said one of the signs on the gate was red and stated "No Trespassing on Road or River Bank." RP 473. Fields said as far as he knew, the signs had been there since the September 11, 2001 attack on the World Trade Center. RP 474. Fields denied having seen any of the other signs shown in Higgs's photographs. RP 474–75. He asserted those signs had been put up after Sullivan's arrest. RP 475.

Sullivan's wife saw a no-trespassing sign on the gate at the end of the service road on the day of the altercation. RP 577. She denied having seen any of the signs in the other photographs. *Id.* Sullivan testified he saw "some signs" posted on the gate to the lower access road. RP 738. Asked what the signs said, Sullivan responded, "I have no idea." *Id.* He denied seeing any other signs. RP 739.

Conant witnessed the altercation between Sullivan and Higgs from about 125 yards to 150 yards away. RP 387. He testified that on the day of the altercation a no-trespassing sign was posted "right by where we were standing by the fence." RP 568. He testified he recognized signs shown in two of the photographs but had never gone far enough down into the rocks to have seen the other signs. RP 568. Conant testified he was familiar with the signs and that they existed on the day of the incident. RP 568. The signs he recognized were at the entrance to the road down to where Sullivan was fishing. RP 569.

Sullivan filed a RAP 9.11 motion in this appeal, seeking to supplement the record with this work order evidence. The State opposed the motion, arguing it should have been filed in superior court under CrR 7.8(b)(2) as a motion for relief from judgment which the trial court could transfer to this Court as a personal restraint petition. The State further argued Sullivan's request failed to meet the conditions required by RAP

9.11 for the taking of additional evidence. This Court agreed Sullivan's motion failed to satisfy the conditions and specifically concluded the evidence of the work order "does not prove that signs were not present on the date in question; the order may have been for replacement signs." App. 1 at 3.

> *Moreover, Mr. Sullivan's conviction for resisting arrest is not dependent upon whether the area was posted 'no trespassing' because the officer told him he was in a restricted area and should not be there.* And when Mr. Sullivan did not leave and did not produce identification, the officer arrested him for trespass."

Id. (emphasis in original). The Supreme Court denied review, ruling the appropriate means for supplementing the record on appeal is through a CrR 7.8 motion or personal restraint petition. App. 2 at 3. Supreme Court Commissioner Price carefully noted her reasoning did not express any view on whether Sullivan could demonstrate a need for a factual hearing under either of these procedures. *Id.*

1. Additional evidence concerning sign location is not required for fair resolution of relevant issues.

The work order dated April 30, 2014 describes itself as: "Left Bank Fishing Access—Purchase and Install Signs for Park Fence & Left Bank". PRP, App. A-1. The Job Plan is for installation of signs saying "no access beyond this point" at 50 foot intervals along the river bank "from edge of access gate to water line" and "along park fence . . ." *Id.* Nothing

sin the document indicate these would be the first such signs to be installed in that area or otherwise supports Sullivan's contention that no signs existed before the date of the work order. *Id.* Nothing related to the work order justifies a reference hearing. The work order is merely evidence that following the arrests of Mellick and Sullivan, dam personnel ordered installation of no-trespassing signs at 50-foot intervals along the riverbank. It has no impact whatsoever on the question of whether Sullivan assaulted Higgs.

Existence of no-trespassing signs may have been marginally relevant to the charge of resisting arrest because the arrest itself must have been lawful. RCW 9A.76.040. Once Higgs notified Sullivan he was in a restricted area, RP 257, whether Sullivan had seen no-trespassing signs was irrelevant to probable cause. Higgs had probable cause to arrest "no later than when Mr. Sullivan did not leave after the officer told him he could not fish there." App. 1 at 4. Higgs had probable cause to arrest for obstructing as soon as Sullivan "refused to produce identification and, instead, asked 'why' . . . ." *Id.*

2. The work order evidence will not change the verdict because it is offered only for impeachment, is cumulative, collateral, and irrelevant.

The work order evidence is offered to impeach Higgs. "When the only purpose of newly discovered evidence is to impeach or discredit

evidence produced at trial, a new trial is not properly granted." *State v. Edwards*, 23 Wn. App. 893, 898, 600 P.2d 566 (1979) (citing *State v. Fairbanks*, 25 Wn.2d 686, 171 P.2d 845 (1946); *State v. Dunn*, 159 Wash. 608, 294 P. 217 (1930)). In *State v. Sublett*, this Court denied Sublett's request for a new trial based on a new witness who, he claimed, could exonerate him. 156 Wn. App. 160, 194, 231 P.3d 231 (2010). This Court held the new witness's testimony did not support a new trial because it would be used merely to impeach another witness who had placed Sublett at the crime scene. *Id.* The materiality of the work order at issue here is infinitesimal compared with the potential materiality of Sublett's newly-discovered witness.

The work order evidence is cumulative. Almost every trial witness testified about no-trespassing signs. Some said signs were in multiple places, others that there was only a sign at the gate. "It is the trier of fact who resolves conflicting testimony, evaluates the credibility of witnesses and generally weighs the persuasiveness of the evidence." *State v. Walton*, 64 Wn. App. 410, 415-16, 824 P.2d 533, *review denied*, 119 Wn.2d 1011, 833 P.2d 386 (1992)). Sullivan's wife testified she and her husband parked by the gate with a sign on it, she saw the sign, and the sign restricted access on the riverbank. RP 577. Even Fields said that sign existed. RP 469, 473.

The existence of no-trespassing signs *along the riverbank* is a collateral issue—it is irrelevant to anything except Higgs's credibility. *State v. Oswalt*, 62 Wn.2d 118, 120, 381 P.2d 617 (1963) (test of collateralness is whether fact could be introduced for any purpose independent of the contradiction). "It is a well recognized and firmly established rule in this jurisdiction, and elsewhere, that a witness cannot be impeached upon matters collateral to the principal issues being tried." *Id.* (citations omitted).

This Court should deny Sullivan's personal restraint petition.

IV. CONCLUSION

This Court should affirm Sullivan's convictions for third degree assault and resisting arrest and deny his personal restraint petition.

DATED this 28th day of September, 2017.

Respectfully submitted,

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No. 33438-4-III
Consolidated with
No. 35223-4-III

BRIEF OF RESPONDENT

APPENDIX 1

The Court of Appeals
of the
State of Washington
Division III

STATE OF WASHINGTON,	)	No. 33438-4-III
Respondent,	)	
v.	)	COMMISSIONER'S RULING
JOSEPH P. SULLIVAN,	)	
Appellant.	)	

Joseph P. Sullivan has appealed the Grant County Superior Court's June 8, 2015 Judgment and Sentence which the court entered on a jury verdict that found that he had committed third degree assault and resisting arrest. Pursuant to RAP 9.11 and the interest of justice, he now moves this Court to remand the matter to the superior court to take additional evidence.

Mr. Sullivan's convictions stem from his entry into an area at Grand Coulee Dam

to fish. The officer who arrested Mr. Sullivan testified that several "no trespassing" signs were visible from the parking lot to the water bank, and the court admitted photographs of the signs that the officer stated he took the same day as his encounter with Mr. Sullivan. Mr. Sullivan testified to the contrary. He also testified that he had heard and read media announcements that the area, which had closed after the September 11, 2001 terrorist attacks, was now re-opened for fishing. According to Mr. Sullivan and other witnesses, the "no trespassing" signs were not present until later.

The State cites the officer's testimony that he did not initially intend to arrest Mr. Sullivan for trespassing. Rather, he intended to merely notify him that he was in a restricted area. Mr. Sullivan refused to produce identification. At that point, the officer attempted to arrest him for obstructing and trespassing. When the officer reached for Mr. Sullivan's arm, Mr. Sullivan pulled away. He then warned Mr. Sullivan that he could arrest him for resisting arrest. The officer again reached for Mr. Sullivan. The officer testified that Mr. Sullivan moved forward and struck the officer on the thigh. They tussled until the officer tasered Mr. Sullivan.

Mr. Sullivan testified in his own defense. He agreed that the officer told him that the area was restricted, at which point they engaged in an exchange about the media reports that the area was now re-opened for fishing and whether the officer had authority to ask him to leave. He also agreed that the officer asked him for identification, and he responded with the question, "why?" RP at 749. In addition, he agreed that the officer

then told him to step back and put his hands behind his back. He differed from the officer's account in that he stated he slipped on the rocks when he attempted to step back. And, the officer then "lunged" at him. RP at 751.

After the verdict, defense counsel received documents from the United States Bureau of Reclamation that reflected that it had ordered "no trespassing" signs six days after the incident and that it installed the signs several months later. Mr. Sullivan argues that this Court should remand his cause to the superior court for a hearing, presumably because he views the new information as proof he was not trespassing.

However, Mr. Sullivan's motion does not satisfy the criteria of RAP 9.11 that a party must meet to add new evidence to the record, which include that the new evidence probably would change the result. Nor, is the new evidence needed to serve the interest of justice.

First, the work order does not prove that signs were *not* present on the date in question; the order may have been for replacement signs. *Moreover, Mr. Sullivan's conviction for resisting arrest is not dependent upon whether the area was posted "no trespassing" because the officer told him he was in a restricted area and should not be there.* And, when Mr. Sullivan did not leave and did not produce identification, the officer arrested him for trespass.

As defined in the jury instructions, "[a] person commits the crime of resisting arrest when he intentionally prevents or attempts to prevent a peace officer from lawfully

arresting him." CP at 323. The instructions also defined "lawful arrest" as an arrest that occurs when "the arresting officer had probable cause to believe the person arrested had committed the crime of criminal trespass in the second degree, obstruction of a law enforcement officer, and/or assault in the third degree in the officer's presence." CP at 326. And, "probable cause" "means facts that would cause a reasonably cautious officer to believe that the person had committed that crime." *Id.*

Here, the officer had been notified that a man was in a restricted area. That information gave rise to probable cause for arrest no later than when Mr. Sullivan did not leave after the officer told him he could not fish there. When Mr. Sullivan refused to produce identification and, instead, asked "why," the officer also had probable cause to arrest him for obstructing. None of the foregoing depends on the presence or absence of "no trespassing" signs.

Accordingly, IT IS ORDERED, Mr. Sullivan's motion to remand to add evidence to the record is denied.

Monica Wasson
Commissioner

No. 33438-4-III
Consolidated with
No. 35223-4-III

BRIEF OF RESPONDENT

APPENDIX 2

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. JOSEPH PATRICK SULLIVAN, Petitioner.	NO. 93445-2 RULING DENYING REVIEW

A Grant County Superior Court jury found Joseph Sullivan guilty of third degree assault and resisting arrest during an incident in which a police officer attempted to arrest Mr. Sullivan for obstructing a law enforcement officer and trespassing. The incident occurred on riverbank property near the Grand Coulee Dam that is managed by the United States Bureau of Reclamation. At trial there was conflicting testimony as to whether "no trespassing" signs were posted in the area. On June 8, 2015, the trial court entered judgment and sentence. About a month later, on July 2, 2015, the Bureau of Reclamation responded to a defense investigator's 2014 Freedom of Information Act request for work orders relating to signage in the area. These documents reflect that some "no trespassing" signs were ordered after the incident and were installed several months later. Mr. Sullivan then asked the Court of Appeals to direct the trial court to take additional evidence related to the orders for and installation of these signs, arguing that a record of this evidence was necessary for

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fair consideration of his direct appeal. Commissioner Wasson determined Mr. Sullivan's motion failed to satisfy the criteria of RAP 9.11 for the taking of additional evidence and findings on review, and denied the motion. A panel of judges denied Mr. Sullivan's motion to modify the commissioner's ruling.

Mr. Sullivan now seeks this court's review. To demonstrate a basis for review he must show that the Court of Appeals either committed obvious error that would render further proceedings useless, or committed probable error substantially altering the status quo or limiting his freedom to act, or so far departed from the accepted and usual course of proceedings as to call for review. RAP 13.5(b).

Under RAP 9.11 additional evidence on review may be taken only if (1) the evidence is needed to fairly resolve the issues on review, (2) the evidence would probably change the decision being reviewed, (3) it is equitable to excuse the party's failure to present the evidence to the trial court, (4) the remedy available through postjudgment motions in the trial court is inadequate or unnecessarily expensive, (5) the appellate court remedy of granting a new trial is inadequate or unnecessarily expensive, and (6) it would be inequitable to decide the case solely on the evidence already taken. All six criteria must be met for the additional evidence to be taken. *State v. Ziegler*, 114 Wn.2d 533, 541, 789 P.2d 79 (1990). Commissioner Wasson concluded that Mr. Sullivan had not shown that the additional evidence would probably change the decision being reviewed. First, she noted that the work orders did not prove that no signs were present on the date in question. Second, she concluded that Mr. Sullivan's conviction for resisting arrest was not dependent on whether the area was posted "no trespassing" because prior to his failure to leave the area the police officer told Mr. Sullivan that the area was restricted and that he was not allowed to be there.

I agree that discretionary review is not warranted, though for a different reason. This court has instructed that if a defendant wishes to raise issues on appeal that require evidence or facts not in the existing trial record, the appropriate means of doing so is through a CrR 7.8 motion or through a personal restraint petition, which may be filed concurrently with the direct appeal. *See State v. McFarland,* 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). Mr. Sullivan's conclusory assertions that such collateral proceedings are inadequate relief are unconvincing, where CrR 7.8(c) provides for the trial court to determine whether resolution of the motion will require a factual hearing and RAP 16.11 provides for a reference hearing if the petition cannot be determined solely on the record. Without expressing any view on whether Mr. Sullivan could demonstrate a need for a factual hearing in a CrR 7.8 motion or personal restraint petition, I conclude that *McFarland* supports the denial of Mr. Sullivan's motion under RAP 9.11. Accordingly, he fails to demonstrate that the Court of Appeals committed error or departed from the usual course of proceedings so as to call for review under the criteria of RAP 13.5(b).

The motion for discretionary review is denied.

COMMISSIONER

December 9, 2016

DECLARATION OF SERVICE

Under penalty of perjury of the laws of the State of Washington, the undersigned declares:

That on this day I served a copy of the Brief of Respondent in this matter by e-mail on the following party, receipt confirmed, pursuant to the parties' agreement:

David R. Hearrean
davidhearrean@gmail.com

Dated: October 3, 2017.

Kaye Burns

GRANT COUNTY PROSECUTOR'S OFFICE

October 03, 2017 - 3:42 PM

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Appellate Court Case Number:	33438-4
Appellate Court Case Title:	State of Washington v. Joseph Patrick Sullivan
Superior Court Case Number:	14-1-00364-4

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- gdano@grantcountywa.gov

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